MALAYSIA BRITISH ASSURANCE BHD

v.

SIHAZKO SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
T SELVENTHIRANATHAN J
[SUIT NO: D7-22-55-2000]
15 DECEMBER 2004

CONTRACT: *Formation - Consideration - Whether exchange of mutual promises could constitute consideration - Contracts Act 1950, s. 2(e), (f)*

CONTRACT: *Consideration - Executory consideration - Whether good consideration - Contracts Act 1950, s. 2(d)*

CONTRACT: *Consideration - Mutual promises - Whether reciprocal promises - Whether exchange of mutual promises could constitute consideration - Contracts Act 1950, s. 2(e), (f)*

CIVIL PROCEDURE: *Action - Cause of action - Whether action involving recovery of a penalty or forfeiture or sum by way of penalty or forfeiture - Whether action merely recovery of a debt due and owing*

The first defendant accepted a tender issued by PNS Development ('PNS') to construct several houses. The tender was *inter alia* subject to the first defendant's execution of a performance bond in favour of PNS in the form of a bank or insurance guarantee for the sum of RM442,977.55. At the request of the defendants and one Ching Ngew Hoe ('Ching'), the plaintiff issued an insurance guarantee dated 5 September 1994 in favour of PNS for the sum of RM442,977.55. Under the insurance guarantee the defendants were required to and did deposit a cash collateral in the sum of RM44,297.76 with the plaintiff. The plaintiff agreed to pay 2% interest per annum on the collateral. In consideration of the plaintiff issuing the insurance guarantee, the defendants and Ching executed letters of indemnity dated 3 September 1994 in favour of the plaintiff whereby they undertook to indemnify the plaintiff in respect of all payments made by the plaintiff under the insurance guarantee performance bond. PNS subsequently called upon the performance bond, and the plaintiff issued a cheque for the sum of RM442,977.55 to PNS and demanded indemnification from the defendants and Ching pursuant to the letters of indemnity. The plaintiff after deducting the cash collateral of RM44,297.76 and a further RM100,000 paid by Ching to discharge his liability, claimed the balance

of RM295,203.93 from the defendants. The plaintiff then applied for summary judgment and signed final judgment against the first, second, fourth and sixth defendants. The first, second, fourth and sixth defendants appealed. These defendants contended that the letters of indemnity executed by them were void and unenforceable for lack of consideration as the insurance guarantee was dated 5 September 1994 whereas the letters of indemnity were executed on 3 September 1994. Thus, the defendants alleged there was no consideration given by the plaintiff when the letters of indemnity were executed. The defendants further alleged that the plaintiff's claim against them constituted an action for the recovery of a penalty or forfeiture, for which limitation had already set in by virtue of s. 6(4) of the Limitation Act 1953.

Held (dismissing the appeals with costs):

[1] The defendants executed the letters of indemnity on the basis of the undertaking given by the plaintiff to issue the insurance guarantee – issued on 5 September 2004. Thus this undertaking or promise by the plaintiff had to be construed as good consideration in view of s. 2(d) of the Contracts Act 1950. (p 427 b-c)

[2] The plaintiff as promisor had required the defendants as promisees to execute the letters of indemnity as consideration for the issuance of the insurance guarantee. Upon execution of the letters of indemnity, the insurance guarantee was issued. The circumstances in this case were so clear-cut. The submissions of defendants' counsel were totally devoid of merit. Additionally, the exchange of mutual promises in the instant case, the execution of the letters of indemnity and the issuance of the insurance guarantee formed the consideration for each other as reciprocal promises within the meaning of paras. (e) and (f) of s. 2 of the Contracts Act 1950. (p 427 d-e)

[3] There was absolutely no basis for the defendants to suggest that the plaintiff's claim was one which involved the recovery of a penalty or forfeiture or sum by way of penalty or forfeiture. The plaintiff's claim was based on the letters of indemnity executed by the defendants in respect of the sum of RM442,977.55 paid to PNS by the plaintiff under the insurance guarantee. There was no element involving any recovery of any penalty or forfeiture or sum by way of penalty or forfeiture in the instant case. It was simply the recovery of a debt due and owing by the defendants minus credit given for cash collateral and interest earned, as a result of the plaintiff paying out the sum of RM442,977.55.
(pp 428 g-h & 429 a-c)

Case(s) referred to:
Wong Hon Leong David v. Noorazman Adnan [1995] 4 CLJ 155 CA ***(refd)***
The First National Bank of Chicago v. Lam Thoo Sang & Ors [1980] 1 MLJ 260 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 2(e), (f)
Limitation Act 1953, s. 6(4)

For the plaintiff/respondent - Tan Keng Teck; M/s Lim Kian Leong & Co
For the 1st and 2nd defendants/appellants - Nordin Kassim; M/s Nordin Adenan & Co
For the 4th and 6th defendants/appellants - Harcharan Singh; M/s Harcharan S Sidhu & Assocs

Reported by Andrew Christopher Simon

JUDGMENT

T Selventhiranathan J:
Two notices of appeal were filed herein in respect of the decision of the learned senior assistant registrar ["the registrar"] allowing the plaintiff to sign final judgment on an application under O. 14 of the Rules of the High Court 1980 ["Order 14 application"] against the first, second, fourth and sixth defendants. The first notice of appeal in encl. (31) was filed by the fourth and sixth defendants while the second notice of appeal in encl. (32) was filed by the first and second defendants.

The registrar had, on a separate O. 14 application taken out by the plaintiff, similarly allowed the plaintiff to sign final judgment against the fifth defendant. However, the fifth defendant did not appeal against the said decision.

As for the third defendant, judgment in default of appearance had also been entered against him and there is no evidence in the file to indicate that any action has been taken by him to apply to set the judgment aside.

The plaintiff's claim against all the defendants was preceded by a letter of agreement on the part of the first defendant to accept a tender issued by a company called PNS Development Sdn Bhd ["PNS"] for the first defendant to construct a total of one hundred and seventy-five units of terraced houses in Province Wellesley, Penang for PNS. The agreement was subject to the compliance by the first defendant of the various terms and conditions stipulated therein. One of the terms which the first defendant had to comply with before the commencement of the construction works was the execution of a performance bond in favour of PNS in the form of a bank or insurance

guarantee for the sum of RM442,977.55, which constituted 5% of the contracted sum of RM8,859,551 for the construction works in question.

At the request of the defendants and one Ching Ngew Hoe ["Ching"], the plaintiff issued an insurance guarantee bearing number 12335/IG/94 dated 5 September 1994 ["the insurance guarantee"] in favour of PNS for the sum of RM442,977.55. In consideration of the plaintiff issuing the insurance guarantee, the defendants and Ching executed letters of indemnity dated 3 September 1994 in favour of the plaintiff whereby they undertook to indemnify the plaintiff in respect of all payments made by the plaintiff pursuant to the performance bond constituted by the insurance guarantee.

On 12 September 1997, PNS called upon the performance bond by making a demand upon the plaintiff to pay over the sum of RM442,977.55 on the ground that the first defendant had failed and refused to fulfil its obligations under the contract entered into between the first defendant and PNS. As a result, the plaintiff through a covering letter dated 9 October 1998 extended to PNS a cheque for the sum of RM442,977.55 as payment. Consequently, the plaintiff demanded indemnification from the defendants and Ching for the said sum pursuant to the letters of indemnity.

It is pertinent to note that under the insurance guarantee the defendants were required to and did deposit a cash collateral in the sum of RM44,297.76 with the plaintiff. The plaintiff agreed to pay interest at the rate of 2% per annum on this collateral with effect from 7 November 1994.

In the circumstances, according to the plaintiff, the actual amount which was therefore due and owing by the defendants, after deducting the cash collateral deposited with the plaintiff and interest accrued thereon, stood at RM395,203.93. In respect of this amount, Ching had paid a sum of RM100,00 to the plaintiff to discharge his liability under the letter of indemnity which he had executed. The plaintiff had agreed to this, leaving the balance of RM295,203.93 to be settled by the defendants.

Since the applicable facts of this case were the same in respect of the first, second, fourth and sixth defendants, the issues raised by them were determined without specific reference to the individual arguments on their behalf.

The primary issue raised by the defendants concerned the letters of indemnity dated 3 September 1994. The defendants contended that the said letters of indemnity executed by them were void and unenforceable for lack of consideration as the insurance guarantee was dated 5 September 1994. As

such, it was urged upon the court that when the letters of indemnity were executed on 3 September 1994, no consideration therefor had been given by the plaintiff.

However, it was abundantly clear that the defendants executed the letters of indemnity on the basis of the undertaking given by the plaintiff to issue the insurance guarantee, and which guarantee was in fact issued on 5 September 1994. Therefore it was unmistakeable that this undertaking or promise by the plaintiff must be construed as good consideration in view of the interpretation given to the expression "consideration" in s. 2(d) of the Contracts Act 1950 which reads as follows:

> (d) when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;

In the present case, the plaintiff as promisor required the defendants as promisees to execute the letters of indemnity as consideration for the issuance of the insurance guarantee. Upon the execution of the letters of indemnity, the insurance guarantee was issued. The circumstances obtaining in this case were therefore so clear-cut that the submissions of both the learned counsel for the defendants on this issue were totally devoid of merit. The Court of Appeal, speaking through Gopal Sri Ram JCA, laid down its view succinctly on this point in the case of *Wong Hon Leong David v. Noorazman bin Adnan* [1995] 4 CLJ 155 at p. 161 as follows:

> It is not and has never been the law of this country that to support an agreement, consideration must always be executed. Executory consideration suffices.

In fact, and additionally, the exchange of mutual promises in this case, ie the execution of the letters of indemnity and the issuance of the insurance guarantee, formed the consideration for each other as reciprocal promises within the meaning of paras. (e) and (f) of s. 2 of the Contracts Act 1950 which provide as follows:

> (e) every promise and every set of promises, forming the consideration for each other, is an agreement;
>
> (f) promises which form the consideration or part of the consideration for each other are called reciprocal promises;

Therefore it was crystal clear that consideration was in fact provided by the plaintiff for the letters of indemnity executed by the defendants despite their execution preceding the issuance of the insurance guarantee in point of time.

In view of the finding of this court on the issue of consideration, the next issue of nudum pactum clearly could not be maintained at all. There is a decision of the High Court in Singapore, namely, *The First National Bank of Chicago v. Lam Thoo Sang and Others* [1980] 1 MLJ 260, where the first defendant there also pleaded nudum pactum and his position was explained in the following words by Rajah J:

> The first defendant although admitting the signing of the guarantee pleaded that the guarantee did not express therein the consideration for his promise and that 'for want of consideration appearing on the face of the said guarantee, it stood simply as an engagement to pay the debt of another without any consideration,' and was therefore, 'a nudum pactum and void'.

However, in deciding this issue, the learned judge said at p. 261 of the report of that case:

> My view of the matter is that the guarantee and the debenture must be read together and when this is done it is patently clear that what the guarantors did guarantee under the guarantee was money which was due and owing as of May 2, 1974 and money to be lent thereafter to the total extent of $1,500,000. Consideration for the said guarantee in my view was the plaintiff bank being induced to sign the debenture.

By analogy, the consideration for the letters of indemnity executed by the defendants for that matter in the present case was the plaintiff being induced to issue the insurance guarantee in favour of PNS.

As for the allegation pertaining to the notices of demand, there obviously was no error in the figures as shown therein as the defendants, pursuant to each cl. 11 of the letters of indemnity, were liable to the plaintiff as principal debtors. Hence, there was no basis for the defendants to suggest that there was duplication in the amount as stated in the notices of demand. Even if one of them settled the sum demanded, all of them would have been discharged from liability to pay any further sum.

Finally, the defendants alleged that the claim of the plaintiff against them was an action for the recovery of a penalty or forfeiture and the limitation period in respect of such a claim was one year by virtue of s. 6(4) of the Limitation Act 1953 which provides as follows:

> (4) An action to recover any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of any written law shall not be brought after the expiration of one year from the date on which the cause of action accrued:

> Provided that for the purpose of this subsection the expression 'penalty' shall not include a fine to which a person is liable on conviction for a criminal offence.

Looking at the plaintiff's claim, there was absolutely no basis for the defendants to suggest that it was one which involved the recovery of a penalty or forfeiture or sum by way of penalty or forfeiture, as the case may be. The plaintiff's claim was based purely on the letters of indemnity executed by the defendants in respect of the sum of RM442,977.55 paid to PNS by the plaintiff under the insurance guarantee. There was therefore no element involving any recovery of any penalty or forfeiture or sum by way of penalty or forfeiture in the circumstances. It was simply the recovery of a debt due and owing by the defendants [minus credit given for the cash collateral and interest earned thereon] as a result of the plaintiff paying out the sum of RM442,977.55 to PNS.

For the foregoing reasons the two notices of appeal taken out by the defendants *vide* encls. (31) and (32) were clearly misconceived and they were therefore dismissed with costs to the plaintiff, with the same to be taxed unless otherwise agreed upon.